STATE OF CALIFORNIA
Energy Resources Conservation
And Development Commission

In the Matter of:	)	
Application for Certification for the	)	**Docket No. 09-AFC-10**
Rice Solar Energy	)	
Power Plant Project	)	
_____	)	

ENERGY COMMISSION STAFF OPPOSITION TO APPLICANT'S

MOTION TO STRIKE AND MOTION TO SHORTEN TIME

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I. INTRODUCTION

On December 1, 2010, Rice Solar Energy (RSE)filed motions to (1) strike some portions of Energy Commission Staff's (Staff) comments on the Presiding Member's Proposed Decision (PMPD), and (2) shorten the time for the Staff's response. Staff opposes the motion to strike as being inconsistent with Energy Commission (Commission) regulations and inconsistent with good public policy. Moreover, RSE's proposed interpretation of Commission regulations is inconsistent with public comment and participation goals set forth in the California Environmental Quality Act (CEQA). Staff does not oppose the motion to shorten time, so long as the motion to strike can be argued before the RSE Committee at the December 3 hearing.

II. THE COMMITTEE MAY ACCEPT AS EVIDENCE ANY EVIDENCE THAT IS PRESENTED AT A PUBLIC HEARING.

Commission siting regulations provide for different levels of evidence. At the broadest level, there is the "administrative record" for the proceeding. The administrative record includes all materials that are entered into the docket of the proceeding. (Cal. Code Regs., tit. 20, §1702(a).) In addition, there is the evidence that comprises the "Hearing Record," which is defined as "the material that the committee or commission accepts at a hearing." (Cal. Code Regs., tit. 20, § 1702(h).) Within the "Hearing Record" there are also two levels of evidence; only those materials that are in the form of testimony or that are officially noticed "are sufficient in and of themselves to support a finding of fact." (*Ibid*. [citing Sections 1212 and 1213 of the Commission procedural regulations].) However, "Hearing Record" evidence includes several lesser categories of evidence that are not testimony, and that are not alone sufficient to support findings of fact. Such testimony includes documentary evidence, public comment, agency comment, and "other evidence that a committee accepts at a hearing." (Cal. Code Regs., tit. 20, § 1702(h)(1) through (h)(6).)

These broader, secondary provisions of the Section 1702 definition are critical: they allow the Committee and the Commission to consider, in reaching their decisions, public

and agency comment on the PMPD during the review period for that document. By contrast, if the Hearing Record were restricted only to testimony provided at the evidentiary hearing, the Commission could not consider public comment or letters providing agency comment in making its decision, unless such was presented as formal testimony. Section 1702 was purposefully written to allow the decision-makers to consider non-testimonial evidence for the decision, even if such evidence may have less "weight" than the testimony itself (the latter being required to support findings).

Thus, Section 1702 would allow the Commission (and its committees) to at least consider the concerns of a landowner or resident adjacent to a project, even though that person had failed to intervene as a party to the proceeding. Likewise, it allows the Commission to hear and consider the numerous comments the Commission receives from local public officials, important public agencies who might otherwise be permitting the project, as well as concerned members of the public, none of whom are typically intervenors providing testimony. Section 1702's broad definition of "hearing record" is required for the Commission's certified regulatory program to meet CEQA public participation requirements. (See, e.g., Cal. Code Regs., tit. 14, §§ 15022(a)(5), 15044, 15064(c), 15084(c), 15086(b), 15087,15088.) Among other things, these provisions require lead agencies to 1) solicit comment from the public and concerned agencies; allow any person to submit comments regarding environmental effects; consider the views of the public on project impacts; allow all persons, including the public and agencies, to submit information contributing to the environmental document, and to consider such information; respond to all comments regarding "significant environmental issues." Thus, absent the broader provisions in Section 1702's definition of "Hearing Record," which allows the Committee to broadly choose from the various kinds of evidence to support its decision, Commission decisions could not be responsive to public comment in the manner required by CEQA.

Of course, RSE's motion to strike does not concern public or agency comment, but rather Staff's most recent PMPD comments, which allegedly include some pictures or observations that were not part of Staff's hearing testimony. However, the same rules apply: to the small extent that Staff's comments on the PMPD introduce evidence that was not part of previous testimony, it is still evidence in the hearing record if it is material that the Committee "accepts at a hearing," as provided by Section 1702(h)(6). Although such evidence is properly part of the "hearing record" as defined, such evidence is of a secondary nature that does not allow it to "in and of themselves support a finding."

RSE argues for a much more restricted view of the evidence the Commission or a committee can rely upon, citing Section 1745(b), although the language cited actually appears in Section 1754(b). However, Section 1754(b) by its own terms **pertains to the hearing at which the PMPD is adopted as the Final Decision before the full Commission**—not the hearing at which the presiding committee hears comments on the PMPD before it goes forward to the business meeting hearing. This is evidenced by the language in Section 1754(a): "Adoption hearings on the [PMPD] or the revised decision, if any, shall be held *before the full commission* . . . ." (Emphasis added.) It is

also made clear by language in Section 1754(b): "*The chairman* may require that certain statements . . . be submitted in advance of the hearing. *The Commission* shall not consider new or additional evidence unless due process requires or the Commission adopts a motion to reopen the evidentiary record." (Emphasis added.)[1]

Unfortunately, Section 1754 is not as clearly congruent with Section 1702 (or the CEQA Guidelines) as it could be. It suggests that the PMPD hearing may also be the Final Decision hearing before the full Commission, although this is contrary to actual agency practice—to solicit comment on the PMPD before going to the Final Decision hearing. This undermines the distinction between the hearing at which a committee receives comments on the PMPD, as opposed to the Commission Final Decision hearing. Moreover, while Section 1754(a) says the "hearing shall be conducted for the purpose of considering final oral and written statements of the parties *and final comments and recommendations from interested agencies and members of the public,*" Section 1754(b) could be read to disallow the Commission from actually considering such comments absent a motion to reopen the evidentiary record. Such a restricted and exclusionary interpretation would be inconsistent with Sections 1702 and 1751, which allow a committee to consider non-testimonial evidence, including unsworn public or agency comment or letters, consistent with CEQA provisions.

Importantly, in 2002 the Commission adopted amendments to Section 1751(a) that contradict such a narrow basis for the decision. Titled "Presiding Member's Proposed Decision; Basis," it provides: "The presiding member's proposed decision shall be based exclusively on *the hearing record*, including the evidentiary record, of the proceedings on the application." Section 1751(a) was a siting process amendment adopted to clarify that the hearing record, which includes a broader range of unsworn materials including public comment, can be considered for the Commission decision. (See Initial Statement of Reasons, p. 4, Docket 01-SIT-1, Oct. 2001.) Section 1751(a), paired with Section 1702 (reviewed and tweaked in the 2007 siting regulation rulemaking) make it clear that the Commission decision may be based more broadly than on testimony alone, in that the entire hearing record may be considered. Section 1754, unchanged since 1993, has unfortunately never been conformed with the more recently adopted and reviewed regulations. However, in this Staff Counsel's experience the Commission has never adhered to the very restrictive evidentiary precepts that RSE now claims that Section 1754(b) requires—for the very reason that such would (1) exclude valuable information from non-parties (including public agencies) offered late in the proceeding and (2) therefore be inconsistent with CEQA requirements. Rather, the Commission has normally (and correctly) held that evidence

[1] The Commission siting regulations are ordered in accordance with the steps of the proceeding. Section 1754 applies to adoption of the Final Decision. Reflecting the order of events, it is a preceding provision, Section 1751 ("Presiding Member's Proposed Decision; Basis"), that addresses what evidence the PMPD may rely on. Section 1751(a) provides: "The [PMPD] shall be based exclusively on *the hearing record*, including the evidentiary [hearing] record, of the proceedings on the application." (Emphasis added.)

offered outside the evidentiary hearing goes to the *weight* of the evidence, not its admissibility.

Accordingly, the more restrictive construction of the Commission's siting regulations proposed by RSE relies on an old, ambiguous, and unreconstructed regulation that is internally inconsistent with the Commission's more recently adopted regulations, inconsistent with the requirements of CEQA, and inconsistent with sound public policy. That construction should be rejected, and the motion to strike denied.

Date: December 2, 2010

Respectfully submitted,

/s/ Richard C. Ratliff
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